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STATUTES

IN THE

Supreme Court of the United States

No.....

ROBERT SCOTT, Petitioner

v.

CITY OF TAMPA, a Municipal Corporation

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Robert Scott, respectfully prays for a writ of certiorari to the Supreme Court of the State of Florida to review the decision and judgment of the said Court in the above entitled case, dated April 3, 1947, and order denying rehearing dated May 19, 1947.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The City of Tampa, a municipal corporation under the laws of Florida, was authorized by its charter, Sec. 31, as amended by Chapter 7249, Laws of Florida 1915, to issue certificates of indebtedness, payable to *bearer* in one, two, three, four and five equal installments, with interest to be fixed by the City Council at a rate not greater than 8% per annum, and to sell or dispose of

the same in payment for street improvements (Appendix).

On February 22, 1927, the City of Tampa issued certificates of indebtedness *under seal,* to pay for the pavement of Broad Street in said city. Petitioner purchased these certificates.

Certificate, A-7108, appears on pages 7-9 Record. The other certificates are similar in form and only vary as to the certificate number, the amount, and the property described as being assessed for the payment thereof.

By the terms of the Certificate the city agreed:

> "The payment of this certificate and the annual interest thereon is hereby guaranteed by the City of Tampa; and in case of non-payment of principal and interest at maturity by the owner of the property herein described, *and the holder or owner of this certificate shall have failed to collect the same by suit against the property or the owner thereof,* the same shall be redeemed by the City of Tampa at the option of the holder of this certificate." (Emphasis Supplied to Show Condition Precedent.)

Sec. 36 of the City Charter, Chapter 8364, Laws of Florida 1919, provided for the enforcement of the liens in the name of the holder thereof by bill in equity or by suit at law. (Appendix).

The petitioner sued upon the several certificates to enforce the liens thereof, but failed to collect, thus bringing into operation the redemption and guaranty provision of the certificates. Suit was filed in the Circuit Court of Hillsborough County, Florida, against the City, to enforce payment of the certificates. The Circuit Court sustained demurrer to the declaration, ruling that the holder of the certificates must first show the exer-

cise of due diligence, or a reasonable explanation for his failure to do so. (R. 27-28.) Petitioner amended his declaration (R. 30-39), averring that at maturity of the certificate and continuously thereafter until the filing of suit to enforce the same, there was no market for the real estate described in the certificate; that during said period of time the petitioner was carrying on negotiations with the city for the payment of the certificate, and that delay in enforcing payment of the certificate did not in any way result in depreciation of the value of the security. The Court sustained demurrer to the amended declaration, and the petitioner filed a second amended declaration (R. 48-60,) averring that the real estate was unimproved and unproductive; that the market value of the land never exceeded the amount of taxes against the same and the cost of foreclosing the certificate.

In the second amended count it is shown that the City of Tampa filed suit in 1941, foreclosing delinquent city taxes for the years 1929-1940, and the property was sold under decree of the Court in that suit for $274.39, an amount less than the principal of petitioner's certificate.

The property covered by the certificates described in the second amended 3rd and 4th counts was foreclosed against for taxes by Hillsborough County in 1944, and the title vested in said county by reason of nonpayment of State and County taxes, so that the principal of petitioner's certificates, $1444.49 and $522.08, became a total loss to the petitioner.

The second amended 5th count shows that the property described therein was foreclosed on for delinquent taxes for the years 1934-1939, and the property sold in 1940; that from the proceeds of this sale petitioner received $163.57, leaving an unpaid principal of $1134.96.

The court sustained demurrer to the second amended declaration, and entered judgment for the City.

On appeal to the Supreme Court of Florida, the judgment of the Circuit Court was affirmed (R. 66-73), upon the theory that the city's obligation to the holder of the paving certificate was that of a guarantor and that Scott had not exercised the due diligence required by the law merchant of a guarantee in attempting "to collect by suit against the property," which the Court likened to a debtor in case of an ordinary commercial guaranty. (R. 66-73.)

The petition for rehearing, grounds 11 and 12, (R. 78,) raised the Federal questions which are now sought to be reviewed by this Court, viz:

> "11. The opinion and order of this Court, if adhered to, will result in depriving your petitioner of his property without due process of law, contrary to and in violation of Section 12 of the Declaration of Rights of Florida and the Fourteenth Amendment to the Constitution of the United States."
>
> "12. The opinion and order of this Court, if adhered to, will violate the obligation of the contracts between the plaintiff and the City of Tampa, set forth in the certificates of indebtedness sued on, contrary to and in violation of Section 17 of the Declaration of Rights of Florida and Article I, Section 10 of the Constitution of the United States."

The petition for rehearing was denied by the Court May 19, 1927. (R. 79.)

Thus every means of enforcing the contract was denied, not because of anything in the contract, but by applying to it the due diligence rule of the law merchant and denying to Scott the right of a jury trial as to whether under the applicable facts and circumstances

he had unduly delayed and whether the City had suffered injury.

THE CITY'S RIGHTS WERE PROTECTED

Under the terms of the certificate and the statute, the certificates were payable "at the office of the City Treasurer of the City of Tampa." Section 7, Chapter 8364, Laws of Florida 1919, (Appendix 22,) expressly provided that the City should keep a record of Certificates of Indebtedness in a book, known as the "Street Improvement Lien Book," which should include all pertinent information, such as payments and cancellations, and "all other such information as the Board may deem advisable."

Chapter 7249, Laws of Florida, 1915, provided:

> "The payment of which said certificate and the annual interest thereon shall be guaranteed by the City of Tampa."

and in event

> "the holder or owner of said certificate shall have failed to collect the same by suit, the same shall be redeemed by the City at the option of the holder of said certificate, but such redemption by the City shall not discharge the lien or assessment against the abutting property;" (Appendix).

The plan thus provided enabled the City to know at all times whether the certificates were paid, and to protect its interest. In this vital respect its position was safeguarded. There is no quesion of solvency or insolvency; the security could not depreciate without the knowledge and opportunity of the City to protect its rights.

II.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under Section 344 (b,) 28 U. S. C., (Jud. Code, Sec. 237,) the petitioner having been denied a right, privilege, or immunity specifically set up and claimed under the due process clause of the Fourteenth Amendment to the Constitution of the United States, and by impairing the obligation of the Contract between the City of Tampa and petitioner, set forth in the certificates sued on, contrary to Article I, Section 10, of the Constitution of the United States.

III.

QUESTIONS

1. *In an action in a State Court to enforce the terms of a clear and unambigious contract under the seal issued by a municipality under statutory authority, can the State Court impose additional limitations not in the contract or the statute which operae to defeat the right of action, without violating the due process clause of the Fourteenth Amendment and Article I, Section* 10, *of the Federal Constitution?*

We contend that the City contracted with the holder of the Certificate that it had created a valid and enforceable lien upon described lands which would pay the city's debt, and by issuing its obligation *under seal,* agreed that the holder might enforce its lien at any time within twenty years from maturity; that the right to *require* redemption is at the option of the holder, coextensive with the right to collect by suit, (although the City *may* redeem at any time after maturity,) and the City cannot short-circuit either the right to collect

out of the property or the right to *require* redemption which follows failure to collect by suit.

We further contend that the failure of the Legislature to write into the law any additional conditions is clear evidence of the intent of the Legislature to apply the Statute of Limitations in force, which would control and define the period of redemption.

In considering this question, we advance these propositions:

(1) The Florida Court has repeatedly, and without exception, held the twenty year statute of limitation applicable to *any* action founded on an instrument of writing *under seal.*

(2) There is no ambiguity or uncertainty on the face of the certificate of indebtedness—the contract—or the law authorizing it, which justifies the interpolation of the due diligence rule of the law merchant.

(3) A State cannot take away a property right, or deprive a person of all existing remedies for the enforcement of a right, either by legislation or retrospective judicial interpretation, and to do so by either method is arbitrary and violative of the due process clause. *Weaver v. Palmer Bros. Co.* 270 U. S., 402; 70 L. ed. 654. *L. Maxcy, Inc. v. Mayo* (Fla.) 139 So. 121.

2. *If a State Court applies the rule of due diligence, can it arbitrarily deny a trial on the merits where plaintiff shows there was no loss or injury by the delay and there was a reasonable excuse for the delay?*

We contend that the amended and second amended declarations show that the plaintiff exercised that degree of diligence which is reasonable and which a man

would exercise if he had no guaranty; that to require a certificate holder to foreclose when there was no market for the real estate and at a time when foreclosure would not have resulted in payment, but only in further expense to the holder, is to require more than the due diligence rule of the law merchant itself requires, and that the facts and circumstances of this case should have been submitted for trial by jury on the merits; it should not have been disposed of summarily on the theory that mere lapse of time alone determines the question, and without regard to the applicable statute of limitations.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. *Investors in municipal securities have a right to rely upon a uniform interpretation of State Laws, and any impairment of these obligations by departure from settled principles of law creates doubt and confusion, undermines the confidence of the general public in such obligations, and depreciates their value.*

The securities here involved are payable to bearer, and sold in the market generally. They have been classified as Bonds, (*Sullivan v. City of Tampa*, 101 Fla. 298, 134 So. 211.) In the cited case the Florida Supreme Court was considering Certificates of Indebtedness issued by the City of Tampa for public improvements, and said "it might be noted that the obligations here in question are promises to pay the principal and interest of a debt under seal of the City of Tampa, and are payable to bearer."

2. *The Florida Supreme Court has decided a question of substantial importance contrary to the settled law of that State and the decisions of the Federal Courts.*

The petitioner purchased the certificates in reliance upon the uniform and unbroken decisions of the State and Federal Courts, to the effect that where contract rights are clear and explicit, such rights cannot be retrospectively impaired, either by legislation or interpretation. The sound administration of justice under the Due Process clause of the Constitution forbids a departure from the settled principles of law existing at the time and place a contract is made.

3. *The holding of the Florida Court, if allowed to stand, will not only impair the enforcement of the contract, and others of like import, but will introduce into the law confusion and uncertainty, so that no investor in a municipal security may know what his rights are, and all such rights may be jeopardized by the arbitrary and varying ideas of different courts as to the meaning of due diligence.*

It is obvious that securities of this kind are bought and sold in the general market, not only in Florida, but in other states. Hence, it is important to the public, as investors in such securities, that this Court determine whether the contract rights of the holder have been impaired, and whether such securities are subject to the retrospective and varying interpretations of the State Courts. The rule of harmony required to establish confidence and stability, can only come from the United States Supreme court, in which is invested the power to uphold the constitutional guarantees for the protection of life, liberty and property. The history of this Court, as reflected by its decisions, is to uphold contracts, particularly securities sold in the open market. The strength

and stability of our institutions rest upon the continued maintenance of these rights, unimpaired by legislative, administrative or judicial retroactive amendment or retrospective interpretation.

BRIEF

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. IN AN ACTION IN A STATE COURT TO ENFORCE THE TERMS OF A CLEAR AND UNAMBIGUOUS CONTRACT UNDER SEAL ISSUED BY A MUNICIPALITY UNDER STATUTORY AUTHORITY, CAN THE STATE COURT IMPOSE ADDITIONAL LIMITATONS NOT IN THE CONTRACT OR THE STATUTE WHICH OPERATE TO TAKE AWAY THE PROPERTY RIGHT, AND DEFEAT THE RIGHT OF ACTION, WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 10, OF THE FEDERAL CONSTITUTION?

1. *The Florida Court has repeatedly and without exception held the twenty year statute of limitations applicable to any action founded on an instrument of writing under seal.*

The applicable Statute of Limitations in force at the time of the execution of these certificates of indebtedness Sec. 95.11 F. S. A., (Fla. Statutes Annotated, 1941,) provides:

> "95.11 *Limitations upon actions other than real actions.*

"(1) Within twenty years.—An action upon a judgment or decree of a court of record in the State of Florida, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal.

"(2) Within seven years.—An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any foreign country.

"(3) Within five years.—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal." * * *

Section 95.03 F. S. A. (Fla. Statutes Annotated, 1941,) provides:

"All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

It is to be noted that Sec. 95.11 provides that the Statute of Limitations of twenty years applies to "an action upon *any contract,* obligation, or liability founded upon an instrument of writing *under seal.*"

Moreover, Sec. 95.03 above quoted, invalidates any provision or stipulation attempting to shorten the period of time provided by the statute of limitations. So, if the City had attempted to incorporate in its contract, a provision shortening the period of limitations, as the Supreme Court of Florida has done by interpretation, such provision would be contrary to public policy, illegal

and void, and the courts of this State are prohibited from giving effect to any such provisions.

In *Caruthers v. Peninsular Life Insurance Co.*, 7 So. 2d, 841, 150 Fla. 467, the Florida Supreme Court applied a twenty year statute of limitations applicable to sealed instruments, pointing out that the seal not only serves as an authenticaion of the instrument, but as the badge of a specialty. The Court refused to shorten the statute of limitations, although the contract had an express provision to that effect.

The decisions of the Florida Supreme Court, as well as the Federal Courts which have passed upon the Florida Statute of Limitations, are uniform in holding that any instrument *under seal* is controlled by the twenty year statute of limitations.

Jordan v. Sayre, 24 Fla. 1, 3 So. 329.

Johnson v. Wakulla County, 28 Fla. 720, 9 So. 690.

Fourth Nat'l Bank of Jacksonville v. Wilson, 88 Fla. 48, 101 So. 29.

Coral Gables v. Skehan, D. C. 47 F. Supp. 1.

Fla. Asphalt Pavement Mfg. Co. v. Fed. Reserve Bank, C. C. A., 76 F. 2d, 326, Certiorari denied. 56 S. Ct. 87, 296 U. S. 577, 80 Law ed. 407.

Under the clear and unmistakable language of the Florida statute, it is difficult to see how the Florida courts could ever have held otherwise. The legislative provisions are clear and inclusive. They admit of no exceptions, and expressly forbid the engrafting of exceptions thereto, either by the parties or the courts. Such exceptions are declared to be contrary to the public policy of the State.

The statute supersedes the Common Law, and so becomes the controlling law. In *Broward v. Broward,* 96 Fla. 131, 117 So. 691, the Florida Supreme Court held:

> "A statute may expressly or by implication supersede the common law, and so become the controlling law within its proper sphere of operation, when no organic provision or principle is thereby violated."

The Florida Supreme Court held, in *Fourth National Bank of Jacksonville v. Wilson,* supra:

> "Parties of a contract are liable according to the *form* in which they respectively execute the contract."

In the case of *Plant City v. Scott,* 148 Fed. 2d. 953, the Federal Circuit Court of Appeals, 5th Circuit, was considering the application of the statute of limitations to paving certificates under seal by the City, and held the twenty year statute applied, the Court saying:

> "The distinction between instruments under seal and those not under seal is substantial, for a seal imports authenticity and consideration, and in Florida they have a life of twenty years." * * *

Thus, whenever the question has been before either the Florida Supreme Court or the Federal Court, the answer has been the same; where the action is founded upon an instrument under seal, the Court has applied the twenty year statute of limitations and refused to shorten it by judicial interpretation. Indeed, the language of the statute is too clear and inclusive to admit of any exception. So it is that the petitioner purchased the certificates of indebtedness under the terms of settled statute law and judicial decisions permitting twenty years in which to enforce the obligation of the contract.

In *Brandon v. Pittman,* 117 Fla. 678, 158 So. 443, the Florida Supreme Court applied the five year statute of limitations to a guarantee in writing *not under seal,* the five year statute of limitations being the one applicable to action on instruments of writing *not under seal.* In that case it was contended that the term "reasonable length of time," specified in the guarantee, was not controlled by the statute of limitations. The Florida Supreme Court met the contention by saying: "This contention is not tenable, because the instrument in writing *not under seal* was good for five years under our statute." * * *

By reference to the certificate of indebtedness (R. 8) it will be observed that the instrument upon which this action is founded had the seal of the City affixed thereto, bringing it within the provisions of our statute of limitations, and yet the court held that Scott's suit against the City, although brought within twenty years, could not be maintained because Scott had not exercised due diligence in foreclosing the lien against the described real estate.

2. THERE IS NO AMBIGUITY OR UNCERTAINTY ON THE FACE OF THE INSTRUMENT OR THE LAW AUTHORIZING IT, WHICH JUSTIFIES THE INTERPOLATION OF THE DUE DILIGENCE RULE.

A similar certificate was construed by the Florida Supreme Court in the *City of Tampa v. W. L. Cobb Construction Company, et al.,* 135 Fla. 630, 185 So. 330, and the Court said: "The contract entered into between the City of Tampa and the purchaser or holder of its paving certificates is stated in clear and unambiguous terms," and while the Court held that failure to collect by suit was a condition precedent to an action against the City,

it refused to go outside the terms of the certificate and introduce new conditions or qualifications. So the Florida Court has construed this contract to be clear, unambiguous, and stated in unmistakable language. Then, why engraft into the statute and the contract the rule of the law merchant; which was a rule arising out of ambiguity and uncertainty as to the meaning of ability to collect?

It is the general rule that where no ambiguity exists in a statute, there is no room for construction. The Court is bound by the clear and unambiguous terms of the statute, and cannot alter the terms and thus enact, instead of construe, law. Nor is it the function of a court to engraft on a statute additions which it thinks the legislature logically might or should have made. *U. S. v. Ewing,* 184 U. S. 522, 29 Sup. St. Rep. 315, 53 Law Ed. 635; *U. S. v. Mo. Pc. R. R. Co.,* 278 U. S. 269, 49 Sup. Ct. Rep. 133, 73 Law Ed. 322; *U. S. v. Cooper Corp.,* 312 U. S. 600, 61 Sup. Ct. Rep. 742, 85 Law Ed. 1071.

That this Court does not favor construction by implication is illustrated in the case of *Savannah v. Kelly,* 108 U. S. 184, 27 Law Ed. 696, where the City of Savannah guaranteed the payment of railroad bonds under the provisions of an act of the Georgia Legislature passed in 1838. Prior to the issue of the bonds, a subsequent act was passed by the Legislature in 1856, which it was claimed repealed by implication the act of 1838, so that the City had no authority to guarantee the bonds; but this Court rejected the contention, saying:

> "The authorities of the City at that time were only anxious to omit nothing which the most critical might regard as important in securing for its obligations all the weight and value properly belonging to an unquestionable pledge of its faith and credit; and certainly now, after the lapse of twenty

years, in which no such question has been raised, it would, in the language of Mr. Justice Grier, in *Mercer Co. v. Hackett,* 1 Wall., 83-94 (68 U. S., XVII, 548, 549,) be contrary to good faith and common justice to permit them to allege a newly discovered construction of an equivocal power.' *Von Hostrup v. Madison,* 1 Wall., 291 (68 U. S., XVII, 538) *Meyer v. Muscatine,* 1 Wall., 391 (68 U. S., XVII, 566;) *James v. Milwaukee,* 16 Wall., 159 (83 U. S., XXI, 267.)"

Likewise, in *Robbins v. Clark,* 127 U. S. 622, 32 Law Ed. 692, this Court held; (third head note:)

"This court cannot interpolate a stipuation into a contract, which is not implied by anything that appears on the face of the contract, and where the surrounding circumstances do not authorize or require a construction of the contract that would import such a stipulation into it."

Neither a court of law or equity can interpolate into a contract what the contract does not contain; *Sheets v. Selden,* 7 Wall., 416, 19 Law Ed. 166; and no exposition is allowable contrary to the expressed words of the instrument where the contract is free from ambiguity; *Kihlberg v. U. S.,* 97 U. S. 398, 24 Law Ed. 1106.

There must be ambiguity or uncertainty upon the face of an instrument, arising out of the terms used, to justify extraneous evidence of usage, and it must be limited to clearing up of the obscurity. It is not admissable for the purpose of adding to the contract new stipulations; *Orient Mutual Ins. Co. v. Wright,* 1 Wall., 466, 17 Law Ed. 505.

Where a provision is left out of the statute, either by design or mistake of the legislature, the courts have no power to supply it. To do this would be to legislate, and not to construe; *Hobbs v. McLean,* 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29 Law Ed. 940.

So it is that the Florida Supreme Court in this case has, by judicial interpretation, engrafted upon the contract and the statute a condition which the legislature, in enacting the law, and the City in making the contract, refused to include in the law or the contract, and a condition which is forbidden by Section 95.03 F. S. A.

3. A STATE CANNOT DEPRIVE A PERSON OF A RIGHT, OR OF ALL EXISTING REMEDIES FOR THE ENFORCEMENT OF A RIGHT, EITHER BY LEGISLATION OR RETROSPECTIVE JUDICIAL INTERPRETATION.

In *Walker v. Whitehead,* 16 Wall. 314, 21 Law Ed. 357, this court was considering an act passed by the Georgia Legislature, imposing the condition that it should not be lawful for a plaintiff to obtain judgment on any debt or contract unless it was made to appear that all lawful taxes had been paid since the making of the debt or contract. This court held the act retrospective:

> "Confiscated the debt by making any remedy to enforce payment impossible . . . There was no warning and there could be no escape. The purpose of the act was plainly not to collect back taxes, that was neither asked nor permitted as a means of purgation, but to bar the debt and discharge the debtor. . . .
>
> "These propositions may be considered consequent axioms in our jurisprudence: The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. *This embraces alike those which affect its validity, construction, discharge and enforcement.*" * * *

> "Any impairment of the obligation of a contract, the degree of impairment is immaterial, is within the prohibition of the Constitution. . . .
>
> "The states are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made. The guaranty of the Constitution gives it protection to that extent." (Emphasis supplied.)

In *City of Chicago v. Selden,* 9 Wall., 50, 19 Law Ed. 954, the court said:

> "Where a contract is valid at the time, by the laws of the state, its Legislature cannot pass an Act impairing its obligation, *nor can any decision of its courts have that effect.*"

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107, this court, after holding that a Federal question raised for the first time on a petition for rehearing in the highest court of the State is raised in time, went on to hold, third head note:

> "A violation of the due process clause may be accomplished by the state judiciary in the course of construing an otherwise valid state statute."

and, fourth head note:

> "The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

In *Gelpcke v. City of Dubuque,* 1 Wall., 175, 17 Law Ed. 520, involved the decision of the state court, invali-

dating municipal bonds, and this court reversed the Iowa court on the grounds that the earlier decisions of that court upheld the validity of similar bonds, the court saying:

> "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' "

The court, in that case, concluded its opinion with this statement:

> "We shall never immolate truth, justice and the law, because a state tribunal has erected the altar and decreed the sacrifice."

In *Douglas v. Pike County,* 101 U. S. 677, 25 Law Ed. 968, this court held that the rights of the parties in regard to municipal bonds are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. In the cited case this court laid down the rule:

> "The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

So it is that this court has repeatedly held that the obligation of a contract cannot be impaired either by legislative or judicial action; that if valid when issued, no subsequent judicial interpretation may destroy them; *Havemeyer v. Iowa County,* 3 Wall., 294; 18 Law Ed. 38.

The courts cannot introduce an exception into a statute where the legislature has made none; *Galloway v. Finlay,* 12 Pet. 264, 9 Law Ed. 1079.

II. *If a State Court applies the rule of due diligence, can it arbitrarily deny a trial on the merits where plaintiff shows there was no loss or injury by the delay and there was a reasonable excuse for the delay?*

In *Coppage v. Kansas,* 236 U. S. 1, 35 Sup. Ct. Rep. 240; 59 Law Ed. 441, this court said:

> "But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives each of these an equal protection; it recognizes 'Liberty' and 'Property' as coexistent human rights and debars the States from any unwarranted interference with either.
>
> "And since a State may not strike them down directly, it is clear that it may not do so indirectly,"

and in *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 17 Sup. Ct. Rep. 581, 41 Law Ed. 979:

> "The mere form of the proceeding instituted against the owner for the condemnation of his property to public use, even if he be admitted to defend, cannot convert the process used into due process of law *if the necessary result is to deprive him of his property without compensation.*" (Emphasis suppiel.)

This is not a case where the State court has made a finding of facts, but the decision of the court is involved with and dependent upon questions of law; it is a decision where there is an entire lack of evidence to support a conclusion of the court, and in the face of admitted allegations showing the existence of the condition precedent. The necessary and inevitable result of the court's decision is to take plaintiff's property without prior notice or warning.

The conclusion of this court in *Brinkerhoff-Faris Trust and Savings Co. v. Hill, supra,* applies here:

> "If the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment (680) would be obvious. *Ettor v. Tacoma,* 228 U. S. 148, 57 L. Ed. 773, 33 Sup. Ct. Rep. 428. The violation is none the less clear when that result is accomplished by an otherwise valid (*First Nat. Bank v. Weld County,* 264 U. S. 450, 68 L. Ed. 784, 44 Sup. Ct. Rep. 385) state statute. The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."

This court must decide for itself whether the contract and its obligation has been impaired; whether the plaintiff has been denied due process of law. To do otherwise would be for this court to abrogate its constitutional duty of upholding the Constitution; *New York Electric Lines Co. v. Empire City Subway Co.,* 235 U. S. 179, 35 Sup. Ct. 72, 59 L. Ed. 184; *Citizens' Sav. Bank v. Owensboro,* 173 U. S. 636, 647, 648, 19 Sup. Ct. 530, 43 L. Ed. 840, 2d headnote.

CONCLUSION

Petitioner's rights under the certificate, and the provisions for its enforcement, are complete without judicial amendment which operates to destroy a vested right in violation of the Federal constitutional guaranty of due process. Further, petitioner has been denied the right of trial on the merits which alone could decide whether there was loss or injury, and whether the holder exercised that degree of diligence which a reasonable man would exercise in the circumstances.

O. K. REAVES,
Tampa, Florida,
Attorney for Petitioner.

APPENDIX

CHAPTER 7249, LAWS OF FLORIDA, 1915, SECTION 1

That Section 31 of Chapter 5363, of the Laws of Florida, approved June 8th, 1903, be amended so as to read as follows: Section 31. The City Council, as soon as said assessment is made, shall issue certificates of indebtedness for the amount so assessed against the abutting property, a separate certificate to be issued against each tract of land assessed, containing a description of the land and the amount of the assessment, together with the general nature of the improvement for which the assessment is made, and the date thereof; said certificate shall be payable to bearer in one, two, three, four, five equal annual installments, with interest to be fixed by the City Council at a rate not greater than eight per cent per annum, payable annually from the date of the issuance of the certificate of indebtedness. The respective installment of principal and the annual interest, payable in one, two, three, four years after date, shall be evidenced by collection coupons as they respectively mature, payment of such coupons, respectively, being satisfaction and payment pro tanto of said certificates; the installment of principal and the annual interest payable five years after date shall be payable only upon the surrender and cancellation of said certificates; said coupons shall be incident to said certificate for the purpose of collection only, and shall not be transferable except by delivery of said certificate.

And the certificate and the coupons shall be so framed that the certificate will not only provide that the payment of the coupons will affect the payment of the certificate pro tanto, but also that the coupon itself shall be used only for collection purposes and can be transferred only by delivery of the principal certificate;

the payment of which said certificate and the annual interest thereon shall be guaranteed by the City of Tampa, and in case of non-payment of principal or annual interest thereon at maturity by the property owner, and the holder or owner of said certificate shall have failed to collect the same by suit, the same shall be redeemed by the City at the option of the holder of said certificate, but such redemption by the City shall not discharge the lien or assessment against the abutting property; and in case of non-payment of annual interest, or any installment upon any certificate issued under the provisions of this act, it shall be optional with the holder thereof to consider the whole of said principal sum expressed in said certificates as immediately due and payable with interest to date. The certificate when issued shall be turned over to the Commissioners of Public Works, who may sell or dispose of the same in payment of said work or improvement, or for cash, in their discretion, and all certificates of indebtedness constituting a lien upon abutting property shall be payable at the office of the City Treasurer of the City of Tampa; Provided, however, the Commissioners of Public Works shall not dispose of any of said certificates until thirty days after the same shall have been entered in the Street Improvement Lien Book, as herein provided, and during said thirty days the property owner may satisfy the same by paying the face of the certificate with interest up to the date of payment, and provided further that the certificates of indebtedness as herein provided for shall be issued for all the work now or that may hereafter be contracted for and uncompleted for which no certificates have been issued.

CHAPTER 8364, LAWS OF FLORIDA, 1919, SECTION 8

That Section 36 of the Charter of the City of Tampa be and the same is hereby amended so as to read as

follows: Section 36. In no event shall the amount or validity of the liens or certificates of indebtedness as provided for by this Charter be questioned in any direct or collateral proceeding instituted more than two months after the maturity of any installment of principal or interest on such liens or certificates of indebtedness, and the terms "abutting property" as used in this Charter shall include adjacent property, and all assessments heretofore made upon adjacent property be and the same are hereby validated and confirmed. In any suit brought to enforce such lien or collection of the amount due upon such certificate of indebtedness, a copy of the entry of such lien in the Street Improvement Lien Book duly certified by the Clerk of the Board of Public Works, under the corporate seal of the city, or the original certificate of indebtedness issued on account of such lien, shall be and constitute prima facie evidence of the amount and existence of the lien upon the property described, and in all cases mentioned in this Charter, where the City of Tampa has acquired, or may hereafter acquire liens for improvements, such liens may and shall be transferred by the sale and delivery of the certificate of indebtedness issued by the City of Tampa in pursuance thereof, and such liens, or any of them, may be enforced in the name of the holder thereof in the following manner: First, by a bill in equity; second, by a suit at law. The bill in equity or the declaration at law shall set forth briefly and succintly the issuance of the certificate of indebtedness issued on account of such lien, the amount thereof, and the description of the property upon which such lien has been acquired and against which such certificate of indebtedness was issued, and shall contain a prayer that they shall be compelled to pay the amount of said lien, or in default thereof, that the said property shall be sold to satisfy the same; but the judgment or decree obtained in said suit shall not be enforced against or be a lien upon any

other property than that against which the assessment was made, and in the decree or judgment, as the case may be, for the enforcement and collection of the amount for which said lien is given, decree or judgment shall also be rendered for a reasonable attorney's fee, not to exceed Twenty-five ($25.00) Dollars, for the institution of the suit, and the sum of ten per cent of the recovery, together with the costs of abstract fees, showing the ownership of the property, and the cost of the proceeding, which attorney's fees and costs shall also be a lien upon said land, and shall be collected at the time and in the manner provided for the collection of the amount for which the lien was originally given, but in no event shall the City be liable for the payment of the attorney's fee herein provided for. Provided, however, that the attorney holding any certificate for collection or for collecting any one or more installments of principal or interest due thereon shall not charge a fee exceeding ten per cent of the amount collected, unless he has instituted suit after notice to the owner or a reasonable effort to give such notice as provided by Section 29 of this Charter.

CHAPTER 8364, LAWS OF FLORIDA, 1919, SECTION 7

That Section 35 of the Charter of the City of Tampa be and the same is hereby amended so as to read as follows: Section 35. As soon as practicable, and within thirty days after the issuance, by the City Council, of any certificate of indebtedness, as herein provided, the Board of Public Works shall cause to be entered in a book kept for that purpose, known as the "Street Improvement Lien Book," the date of each certificate, the lot upon which the lien is claimed, the amount or amounts due according to the terms of said certificate, and when due, and such other information as the Board

may deem advisable. Upon payment of any certificate so entered in the Street Improvement Lien Book the holder of said certificate shall produce the certificates before the Clerk of the Board of Public Works for cancellation, and it shall be the duty of the Clerk to cancel said certificates, as well as the record thereof, in the Street Improvement Lien Book. And in the event that a property owner wishes to pay or redeem any collection coupon, or entire certificate, before maturity, he may apply to the Boar dof Public Works for a certificate of the amount due, and the amount shall be the face of the collection coupon with interest up to the date of maturity, and if the entire amount of the certificate yet unpaid is desired to be paid and the certificate cancelled in full, the property owners shall pay the entire amount unpaid, with interest up to the next installment period, and deposit the said amount with the City Treasurer and take a receipt therefor, and upon the presentation of the receipt of the City Treasurer, the Clerk of the Board of Public Works shall note and enter in the Street Improvement Lien Book a partial payment or full satisfaction of said lien and the amount of such payment, as the case may be. Upon the presentation of the collection coupon the Clerk of the Board of Public Works shall cancel said collection coupon and note in the Street Improvement Lien Book a partial payment of said installment and partial satisfaction of said lien to the amount of such collection coupon, and shall enter upon the back of such coupon the amount due to the date of payment, and also make a similar entry in the Street Improvement Lien Book; and should payment be made to the City Treasurer of the City of Tampa, which, under the provisions hereof, can be done, it shall be the duty of the Treasurer to at once make a memorandum thereof in a book to be kept by him for that purpose, showing the date of such payment, the number of the certificate and the property on account of which said payment is

made, and he shall at once certify such facts to the Clerk of the Board of Public Works, and said Clerk of the Board of Public Works shall make entry of such facts on the Street Improvement Lien Book, as provided when payment is made to the holder of said certificate and the same is produced before him; but the City Treasurer shall not receive any payment on account of any certificate except as hereinbefore provided, nor shall he receive any payment on account of any certificate if any installment of principal or interest thereon is past due and the holder of said certificate has placed the same in the hands of an attorney for collection, and he has not notified the City Treasurer in writing.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 266

ROBERT SCOTT, Petitioner

v.

CITY OF TAMPA, a Municipal Corporation

REPLY BRIEF OF PETITIONER

O. K. REAVES,
Tampa, Florida,
Attorney for Petitioner.

IN THE

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ROBERT SCOTT, Petitioner,

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PETITIONER'S REPLY BRIEF

Little need be said in reply to Respondent's Brief, however, a few authorities should be added to those cited in our Main Brief in order that the Court may the more quickly see the fallacy of opposing Counsels' contention and the inapplicability of their authorities. Their argument is:

1. That the application by the State Court of laches or the statute of limitation does not present a Federal question and that the petition in this case presents nothing more.

2. That a Federal question cannot be raised for the first time in a petition for rehearing in a State Court of last resort.

These arguments overlook that the constitutional violations complained of are not by the Legislative Department in a Statute, or by the Executive or Administrative Departments of the State in some positive action sought to be set aside, but by the Judicial Department, to-wit: by the Supreme Court itself in the very opinion and judgment which Petitioner seeks to have reviewed. In such cases this Court has definitely held that the

Federal question may be raised for the first time in Petition for Rehearing in the State Supreme Court.

Saunders vs. Shaw,
244 U. S. 317, 37 Sup. Ct. 638

Brinkerhoff-Faris Trust & Savings Co. v. Hill
281 U. S. 673, 50 Sup. Ct. 451

In the Saunders case the question was raised for the first time by an assignment of error in the State Supreme Court after that court denied petition for rehearing.

This Court said:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice granted the writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."

In the Brinkerhoff case the question was whether the levy of a disproportionate tax violated the Federal due process clause. The Federal question was raised for the first time on petition for rehearing. The State Supreme Court held that the taxpayer should have sought relief through the proper administrative board and having failed to do so

"it was clearly guilty of laches"

and was not entitled to relief in the Court. This Court, however, held that such holding was not consistent with a prior decision of the State Supreme Court and that by thus

> "refusing relief because of new found power of the State Tax Commission, the State transgressed the due process clause of the 14th amendment"

and that the Federal question was properly raised upon petition for rehearing in the State Supreme Court. In that case

> *"the petition was denied without opinion"*

referring to the petition for rehearing. The Brinkerhoff case seems to be a complete answer to all of counsels' arguments.

The above cited cases are not overruled, but are expressly reaffirmed and differentiated in

> *American Surety Co. v. Baldwin*
> 287 U. S. 156, 53 Sup. Ct. 98

cited by opposing Counsel. Under the peculiar facts of the Surety Co. case, the rule was not applicable.

Counsels' Brief claims that the petition for rehearing was not made a part of the record of the State Supreme Court, and that the Federal questions raised were not referred to in denying the petition. It can make no difference whether the petition for rehearing is technically a part of the record or not. Suffice it to say that the Clerk of the State Supreme Court certified said petition as part of the record. Furthermore the Federal questions in this case were raised in a separate amendment or addition to the petition for rehearing, pursuant to leave of the Florida Court especially granted, (R. 49) and the Order denying the petition is in the following words:

> "Counsel for Appellant having filed in this cause Petition for Rehearing and Amended Petition for Rehearing and having been duly considered it is ordered by the Court that both the Petition for Rehearing *and amendment are denied.*" (Emphasis ours. Record 50)

So, it is that in this case the amendment expressly raising the Federal question was made a matter of separate consideration and of separate and distinct action by the State Supreme Court. Petitioner, of course, had no means of compelling the Supreme Court to write an opinion, but it is inconceivable that an opinion would have shown more clearly the definite action of the Court upon the Federal questions than the separate filing of the petition raising those questions, the order of the Court allowing such filing, and the separate and distinct ruling of the Court thereon in denying the rehearing applied for on that ground.

Finally the point urged is extremely technical and therefore contrary to the spirit of the rules of civil procedure and the trend of recent adjudications.

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."
>
> *Lynch v. U. S.*, 292 U. S. 571-589, 78 L. ed. 1434

If it makes any difference, it is noticeable that Counsels' Brief (P. 2-3) erroneously states that the properties covered by the certificates

> "Had greatly depreciated in value or was lost for non-payment of taxes"

On the contrary, the Second Amended First Count, states on page 31 of the Record, that there was no market at any time for the lands and that the foreclosure of the certificate would have entailed large outlays by the holder, and that the foreclosure and sale when made

> "was at the highest market since the maturity of said certificate and that the amount realized on foreclosure sale was the maximum obtainable therefor at foreclosure sale"

Similar allegations are in other Counts and said allegations are admitted by the Demurrers thereto filed by respondents. Also much of the properties as were sold for the non-payment of taxes were sold at public sale and the same test of value thereby followed as if foreclosed and sold under the certificate.

Respectfully submitted,

O. K. REAVES,
Attorney for Petitioner.

INDEX

CITATIONS

CASES:

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.....

ROBERT SCOTT, Petitioner

v.

CITY OF TAMPA, a Municipal Corporation

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Circuit Court of Hillsborough County, Florida, wrote an opinion (Tr. 11-13). The Supreme Court of Florida's opinion (Tr. 42-48) is reported in Scott v. City of Tampa, 30 So. (2d) 300.

JURISDICTION

The petition for writ of certiorari was filed on August 15, 1947. Jurisdiction of this Court is attempted to be invoked under Section 344 (b) 28 U. S. C., (Jud. Code, Sec. 237).

QUESTION PRESENTED

We respectfully submit that the question as stated by petitioner on Pages 6 and 10 of his brief is incorrect. The question implies that the State Court imposed additional limitations in the conditional contract of guaranty, the alleged effect of which was to violate the due process clause of the Fourteenth Amendment and Article 1, Section 10, of the Federal Constitution. The guaranty of collection as the same appears in the paving certificates sued upon is set forth in the declaration (complaint), (Tr. 1) and is as follows:

> "The payment of this certificate and annual interest thereon is hereby guaranteed by the City of Tampa; and in case of non-payment of principal and interest at maturity by the owner of the property herein described, *and the holder or owner of this certificate shall have failed to collect the same by suit, against the property or the owner thereof,* (the same shall be redeemed by the City of Tampa at the option of the holder of this Certificate.")

The allegations of the original declaration (Tr. 1 and 9), and the amended declaration (Tr. 13-27), including the exhibits attached and made a part of the declaration, conclusively show that the period of time between the default in the payment of the paving certificates or any installment thereof, and the dates upon which suits were instituted by the guarantee, petioner, against the respondent, City of Tampa, on five paving certificates was from *fifteen to seventeen years* the defaults on the five certificates occurring at different times.

The allegations of the declaration and exhibits further show that during this long period of time, the property which the certificate holder had to proceed against by suit first before being entitled to sue the City of Tampa on its guaranty, had greatly depreciated

in value or was lost for non-payment of taxes. The State Court held that these allegations failed to show that the certificate holder had used due diligence, in first pursuing and exhausting his remedy against the property as the conditional contract of guaranty provided, before proceeding against the guarantor. (Opinion of State Court Tr. 42-48). The Court did not impose any additional limitations upon the conditional guaranty of collection by requiring due diligence on the part of the certificate holder, but such is the universal law and was part of the contract at the time it was made.

ARGUMENT

1. The question presented is not a federal question.

The gravamen of the State Court's decision is that petitioner is barred by laches from proceeding against the respondent on its conditional guaranty of collection. This Honorable Court has repeatedly held that the application of laches or the statute of limitations does not present a federal question. In *Great Western Telegraph Company v. Purdy,* 162 U. S. 329, 40 L. Ed. 986, the Court unequivocably held (Syll. No. 6):

> "The time when a cause of action accrues under a state statute is not a Federal question, but is a local question, on which the decisions of state courts cannot be reviewed by the Supreme Court of the United States."

In the case of *Moran v. Horsky, Jr.,* 178 U. S. 205, 44 L. Ed. 1038, the question was squarely decided, to-wit, (Syll.):

> "A decision by a state court sustaining the defense of *laches* against the assertion of a right to a mining claim after it had been abandoned for *fourteen years,* during which an apparent title had been obtained under a patent to a probate judge for the property as part of a town site, is based on a ground *independent of any Federal question.*"

In the oft cited case of *Preston v. City of Chicago, et al.*, 226 U. S. 447, 57 L. Ed. 293, the Court held (Syll. No. 2):

> "A judgment of a state court denying the petition for a writ of mandamus to compel the restoration to the pay rolls of the name of a policeman who had been removed from office, which rests in part upon the ruling that the right to the relief prayed was in any event *barred by long delay and laches*, cannot be reviewed by a writ of error from the Federal Supreme Court, although it was contended that he was denied due process of law by summary removal."

In the case of *Wood v. Chesborough, et al.*, 228 U. S. 672, 57 L. Ed. 1018, it is stated in the opinion (Page 1020 L. Ed. Report):

> "And yet it is well established that if there be Federal and non-Federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court. *And certainly the application of laches and the statute of limitations does not present a Federal question.* Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. Ed. 510, 32 Sup. Ct. Rep. 236; Preston v. Chicago, 226 U. S. 447, 450 ante, 293, 33 Sup. Ct. Rep. 177."

Also in *Caruthers v. Mayer, et al.*, 164 U. S. 325, 41 L. Ed. 453, the Court held (Syll.) as follows:

> "In ejectment for a mining claim a decision of the state court in favor of plaintiff's title under a patent of the United States, and *against the defenses of adverse possession and an alleged estoppel in pais, presents no Federal question.*"

We do not deem it necessary to encumber this brief with the further citation of authorities to sustain such a well established proposition. The holding of the Florida Supreme Court that the petitioner was guilty of laches in failing to use due diligence in first pursuing and exhausting his remedy against the property by

foreclosing his paving lien, was entirely a matter for the State Court to decide and certainly presents no federal question.

We therefore respectfully submit that the petition for writ of certiorari should be denied on this ground alone.

2. A Federal question cannot be raised for the first time in a petition for re-hearing in the State Court of last resort.

Even if the petition for writ of certiorari did present a Federal question, we respectfully submit that it is too late for that question to first be raised in a petition for re-hearing in the Florida Supreme Court. There is only one exception to this rule and that is when the State Court *entertains* a petition, *decides* the Federal question, *and this appears by the record.*

In the case at bar it appears that petitioner filed an "amendment" to his petition for re-hearing in the Florida Supreme Court (Tr. 49) in which he attempts to set up the purported Federal question, to-wit: that the ruling of the State Supreme Court against him violated the due process clause of the Fourteenth Amendment and Article 1, Sec. 10, of the Constitution of the United States. On May 19, 1947 the State Court entered its order denying the petition for re-hearing (Tr. 50) *without passing upon the purported Federal question nor making any reference to it whatsoever.*

We respectfully call the Court's attention to Paragraph (d) of Rule 25 of the Supreme Court of Florida which reads as follows:

> "A copy of the petition (for rehearing) shall be served upon the opposite party or counsel at or before the time of its submission to the Court and

> proof of such service transmitted to the Supreme Court with the petition. *It shall not be considered a part of the record in the cause unless so ordered or rehearing granted.* No argument shall be allowed on the petition."

No rehearing was granted nor was any order made making the petition for rehearing a part of the record in this cause, and this conclusively shows that no determination of the purported Federal questions was ever made by the State Court.

In *McMillen, et al., v. Ferrum Mining Co.,* 197 U. S. 343, 49 L. Ed. 784, this Honorable Court held that (Syll):

> "A Federal question first raised by a petition for a rehearing in the highest state court is too late to support the appellate jurisdiction of the Supreme Court of the United States, where the state court, *in denying the petition, made no reference to the Federal question.*"

Next is the case of *Waters-Pierce Oil Co. v. State of Texas,* 212 U. S. 112, 53 L. Ed. 431, wherein the Court said (Opinion Page 434, L. Ed. Report):

> "The attempt to assign new errors in the petition for rehearing, which was overruled *without an opinion passing on Federal questions,* cannot avail. McCorquodale v. Texas (211 U. S. 432, ante, 269, 20 Sup. Ct. Rep. 146), decided at this term of this court, and previous cases therein cited. We are therefore of the opinion that no substantial Federal question is presented in this case, and the writ of error must be dismissed."

In *Godchaux Co. v. Estopinal,* 251 U. S. 179, 64 L. Ed. 213, it is stated in the opinion (Page 214 L. Ed. Report), to-wit:

> "The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must

have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late *unless the Court actually entertains the petition and passes upon the point.* Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375; St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, 60 L. ed. 622, 36 Sup. Ct. Rep. 274; Missouri P. R. Co. v. Taber, 244 U. S. 200, 61 L. ed. 1082, 37 Sup. Ct. Rep. 522." s

In *Mergenthaler Linotype Co. v. Davis, et al.,* 251 U. S. 256, 64 L. Ed. 255, the case of Godchaux v. Estopinal was followed, the opinion stating (Page 258, L. Ed. Report):

> "The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. *But this point came too late, being first advanced below on the motion for rehearing. Godchaux Co. v. Estopinal, supra.*"

Closely following the last two cited cases is *Jett Bros. Distilling Co. v. City of Carrollton,* 252 U. S. 1, 64 L. Ed. 421, where the Court stated (Page 424 L. Ed. Report), to-wit:

> "As we have said, whatever the effect of a petition for rehearing, it came too late to make the overruling of it, *in the absence of an opinion,* the basis of review by writ of error."

In *Wall v. Chesapeake & Ohio Railway Co.,* 251 U. S. 125, 65 L. Ed. 856, the Court said (Opinion Page 857 L. Ed. Report):

> "Our jurisdiction is invoked upon the theory that validity of the amending act was challenged below because of conflict with the Federal Constitution. But the point was not raised prior to the petition to the Supreme Court for a rehearing, which was

> overruled *without more.* 290 Ill. 227, 125 N. Ed. 20. It could have been presented earlier. According to the well-established rule, we may not now consider it; and the writ of error must be dismissed. Godchaux Co. v. Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 Sup. Ct. Rep. 116."

The court in the case of *Rooker v. Fidelity Trust Co.,* 261 U. S. 114, 67 L. Ed. 556, applied the unalterable rule. The Court in its opinion stated (Page 563 L. Ed. Report):

> "It has been examined, and we find it does not show that the question was raised in any way prior to the judgment of affirmance in the Supreme Court. In their assignments of error on the appeal to that court the plaintiffs said nothing about the statute or its validity; nor was there any reference to either in the court's opinion. All that appears is that, after the judgment of affirmance, the plaintiffs sought to raise the question by a petition for rehearing, *which was denied without opinion. But that effort came too late.* Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 682, 689, 37 L. ed. 610, 612, 13 Sup. Ct. Rep. 771; Godchaux Co. v. Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 Sup. Ct. Rep. 116; Citizens Nat. Bank v. Durr, 257 U. S. 99, 106, 66 L. ed. 149, 152, 42 Sup. Ct. Rep. 15."

One of the last, if not the latest decision of this Honorable Court on this academic question is *Baldwin v. American Surety Co.,* 287 U. S. 156, 77 L. Ed. 231. In an able opinion by Mr. Justice Brandeis, the Court stated (Pages 235 and 236 L. Ed. Report):

> "The certiorari granted in No. 3 to review the judgment rendered by the Supreme Court of Idaho on May 2, 1931, must be dismissed for failure to make seasonably the Federal claim."
>
> "The Surety Company petitioned for a re-hearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Four-

teenth Amendment. *The petition was denied without opinion."*

There are many other decisions of this Honorable Court on this question, but we have been unable to find a single instance in which the Court departed from the rule laid down in the above cited cases.

The order of the Florida Supreme Court denying the petition for rehearing (Tr. 50), made no mention whatsoever of the purported Federal questions which the petitioner attempted to raise for the first time in an amendment to his petition for rehearing. The effect of such order is to bring the case at bar squarely within the rule laid down by the above authorities.

CONCLUSION

We respectfully submit that the question of laches which the petitioner has attempted to raise is a matter solely for the State Court to decide and, secondly, that even if it could possibly be construed to present a Federal question, it came too late when raised for the first time in a petition for rehearing in the State Court of last resort, which summarily denied the petition without opinion and without making any reference whatsoever or mention of any grounds in the petition for rehearing purporting to raise Federal questions. We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

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